No. 18-60302

In the United States Court of Appeals for the Fifth Circuit

CONSUMER FINANCIAL PROTECTION BUREAU,
Plaintiff-Appellee,

v.

ALL AMERICAN CHECK CASHING, INCORPORATED; MID-STATE FINANCE, INCORPORATED; MICHAEL E. GRAY, INDIVIDUALLY,
Defendants-Appellants.

On Appeal from the United States District Court
for the Southern District of Mississippi,
in Civil Action No. 3:16-cv-356

BRIEF OF THE STATES OF TEXAS, ARKANSAS, GEORGIA, INDIANA, KANSAS, LOUISIANA, MICHIGAN, NEBRASKA, OKLAHOMA, SOUTH CAROLINA, TENNESSEE, UTAH, WEST VIRGINIA, AND PAUL R. LEPAGE, GOVERNOR OF MAINE, AS AMICI CURIAE IN SUPPORT OF APPELLANTS

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Interest of Amici Curiae

Amici are the States of Texas, Arkansas, Georgia, Indiana, Kansas, Louisiana, Michigan, Nebraska, Oklahoma, South Carolina, Tennessee, Utah, West Virginia, and Paul R. LePage, Governor of Maine. States have "special solicitude" to challenge unlawful federal Executive Branch actions. *Massachusetts v. EPA*, 549 U.S. 497, 520 (2007). Courts have long recognized that the States guard "the public interest in protecting separation of powers by curtailing unlawful executive action." *Texas v. United States*, 809 F.3d 134, 187 (5th Cir. 2015), *aff'd by equally divided Court*, 136 S. Ct. 2271 (2016) (per curiam).

In this case, the Consumer Financial Protection Bureau (CFPB) has wielded its unchecked power to bring an enforcement action against All American Check Cashing, Inc. and other entities (collectively, "All American"), alleging deceptive trade practices. States enforce robust consumer protections, and indeed have severely sanctioned All American for its unlawful conduct. If federal agencies wish to assist States in protecting consumers and policing deceptive trade practices, they must do so in a manner consistent with Article II of the Constitution. For the reasons set out below, the CFPB's structure violates the Constitution. The CFPB thus has no authority to bring the enforcement action at issue in this case.

Amici therefore ask this Court to declare the CFPB's structure unconstitutional.[1]

[1] Neither amici nor counsel received any monetary contributions intended to fund preparing or submitting this brief. No party's counsel authored this brief in whole or in part.

Introduction

The "ultimate purpose" of our Constitution's separation of powers "is to protect the liberty and security of the governed." *Metro. Washington Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 272 (1991). That is why the Framers "viewed the principle of separation of powers as the absolutely central guarantee of a just Government." *Morrison v. Olson*, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting). This case calls upon the Court to vindicate that principle by striking down the unlawful action of an administrative agency built around a single unaccountable and unchecked administrator.

That agency—the CFPB—was created in 2010 under the Dodd-Frank Act. Charged with enforcing various federal consumer-protection laws, the CFPB is headed by a single director—not a board or a group of commissioners. The director is appointed by the President, with the advice and consent of the Senate, to a five-year term. 12 U.S.C. § 5491(b), (c). He may be removed by the President only for "inefficiency, neglect of duty, or malfeasance in office." *Id.* § 5491(c)(3).

That structure is unprecedented. Before the CFPB's creation, "[n]o independent agency exercising substantial executive authority ha[d] ever been headed by *a single person*." *PHH Corp. v. Consumer Fin. Prot. Bureau*, 881 F.3d 75, 165 (D.C. Cir. 2018) (en banc) (Kavanaugh, J., dissenting) (emphasis in original). As Judge Kavanaugh of the D.C. Circuit recently observed, "the Director of the CFPB possesses more unilateral authority—that is, authority to

take action on one's own, subject to no check—than any single commissioner or board member in any other independent agency in the U.S. Government." *Id.* at 165-66 (Kavanaugh, J., dissenting). Indeed, "other than the President, the Director enjoys more unilateral authority than any other official in any of the three branches of the U.S. Government." *Id.* at 166 (Kavanaugh, J., dissenting); *see also Consumer Fin. Prot. Bureau v. RD Legal Funding, LLC*, No. 17-CV-890 (LAP), 2018 WL 3094916, at *35 (S.D.N.Y. June 21, 2018) (finding the CFPB's structure unconstitutional for the reasons identified by Judge Kavanaugh).

The Constitution forbids concentrated, unchecked authority in a sole, unaccountable director of an administrative agency charged with wielding executive power. And with good reason: a single-headed agency lacks the critical structural attributes that have historically justified multi-member regulatory commissions. Courts have permitted multi-member commissions on the basis that such a structure poses less threat to individual liberty than does a single-headed commission. *See, e.g.*, *Humphrey's Ex'r v. United States*, 295 U.S. 602, 629 (1935); *see also* 51 Cong. Rec. 10,376 (1914) (Federal Trade Commission "would have precedents and traditions and a continuous policy and would be free from the effect of . . . changing incumbency"). An agency built around a sole director, by contrast, is unchecked by the constraints of group decisionmaking among members appointed by different Presidents. *PHH Corp.*, 881 F.3d at 166, 178 (Kavanaugh, J., dissenting) (citing Senate Committee on Governmental Affairs, Study on Federal Regulation, S. Doc. No. 95-91, vol. 5,

at 35 (1977)). A single director, in other words, "poses a far greater risk of arbitrary decisionmaking and abuse of power, and a far greater threat to individual liberty, than a multimember independent agency does." *Id.* at 166 (Kavanaugh, J., dissenting).

In this case, the CFPB brought that unchecked power to bear on All American for allegedly unlawful trade practices. It has done so free from any oversight by the Executive. Amici take no position on the propriety or legality of the business activities targeted in the CFPB's enforcement action in this case. Whatever those merits may be, the CFPB has no power to litigate them, because the CFPB's structure renders it unconstitutional. It follows that any action the CFPB undertakes is necessarily invalid.

Combating unlawful trade practices is among a State's most important responsibilities. The extent to which federal administrative agencies should involve themselves in consumer protection is debatable; what is not debatable, though, is the duty to comply with the Constitution. The Court should reverse the decision below.

ARGUMENT

The CFPB has the power to "seek to implement and, where applicable, enforce Federal consumer financial law" as a means of ensuring that "all consumers have access to markets for consumer financial products and services" and that the markets for such products and services are "fair, transparent, and competitive." 12 U.S.C. § 5511(a). The CFPB furthermore may prescribe

rules implementing consumer-protection laws; conduct investigations of market actors; and enforce consumer-protection laws in administrative proceedings and in federal court, including through civil monetary penalties. *See, e.g.*, *id.* §§ 5511(c), 5562, 5563, 5565.

The Constitution does not permit the government to consolidate those sweeping executive powers in an administrative agency headed by a sole director who may be removed only for cause. Courts should thus invalidate any enforcement action promulgated pursuant to that unconstitutional structure.

I. The CFPB's Structure Violates the Constitution's Separation of Powers.

The Constitution vests "[t]he executive power" in the President and compels him to "take care that the laws be faithfully executed." U.S. Const. art. II, § 1, cl. 1; *id.* art. II, § 3. Precedent provides that removal restrictions such as those governing the CFPB are permissible only for multi-member commissions, not for those headed by a single director.

A. The President Must Retain the Power to Remove at Will the Heads of Single-Director Agencies.

Article II bestows "[t]he executive power" in a single, unitary executive. It makes "emphatically clear from start to finish" that "the president would be personally responsible for his branch." Akhil Reed Amar, AMERICA'S CONSTITUTION: A BIOGRAPHY 197 (2005). The Framers demanded "unity in the Federal Executive" to guarantee "both vigor and accountability." *Printz v.*

United States, 521 U.S. 898, 922 (1997). This unitary executive further promotes "[d]ecision, activity, secre[c]y, and d[i]spatch" in ways that a "greater number" cannot. 3 Joseph Story, Commentaries on the Constitution of the United States § 1414, at 283 (1833).

Of course, as a practical matter, the President cannot carry out the full scope of "the executive power" on his own. That is why, "as part of his executive power," the President "select[s] those who [are] to act for him under his direction in the execution of the laws." *Myers v. United States*, 272 U.S. 52, 117 (1926). Selecting assistants and deputies lies at the heart of "the executive power," which necessarily includes "the power of appointing, overseeing, and controlling those who execute the laws." *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 492 (2010) (quoting 1 Annals of Cong. 463 (1789) (Joseph Gales ed., 1834) (remarks of Madison)).

The President's essential power to select administrative officials necessarily includes the power to "remov[e] those for whom he cannot continue to be responsible." *Myers*, 272 U.S. at 117; *see Bowsher v. Synar*, 478 U.S. 714, 726 (1986) ("Once an officer is appointed, it is only the authority that can remove him, and not the authority that appointed him, that he must fear and, in the performance of his functions, obey." (quotation marks omitted)); *PHH Corp.*, 881 F.3d at 168 (Kavanaugh, J., dissenting) ("To supervise and direct executive officers, the President must be able to remove those officers at will."); Neomi Rao, *Removal: Necessary and Sufficient for Presidential Control*,

65 ALA. L. REV. 1205, 1215 (2014) ("The text and structure of Article II provide the President with the power to control subordinates within the executive branch.").

Since the Founding, it has been understood that the removal power is necessary "to keep [executive] officers accountable." *Free Enter. Fund*, 561 U.S. at 483. This view "soon became the 'settled and well understood construction of the Constitution.'" *Id.* at 492 (quoting *Ex parte Hennen*, 38 U.S. (13 Pet.) 230, 259 (1839)).

After all, if the President could not remove agents, then "a subordinate could ignore the President's supervision and direction without fear, and the President could do nothing about it." *PHH Corp.*, 881 F.3d at 168 (Kavanaugh, J., dissenting) (citing *Bowsher*, 478 U.S. at 726). That, in turn, would intolerably impinge on the President's duty to execute the law. *See id.* And it would upend the chain of command on which the Executive Branch relies to function properly. *See Free Enter. Fund*, 561 U.S. at 513-14; *see also id.* at 484 ("The President cannot 'take Care that the Laws be faithfully executed' if he cannot oversee the faithfulness of the officers who execute them.").

The Supreme Court first recognized and adopted this commonsense understanding in *Myers v. United States*, when it struck down as unconstitutional a statutory provision that restricted the President's power to remove certain executive officers. 272 U.S. at 176. The Court held: "[W]hen the grant of the executive power is enforced by the express mandate to take care that the laws

be faithfully executed, it emphasizes the necessity for including within the executive power as conferred the exclusive power of removal." *Id*. at 122. If the President lacked the exclusive power of removal, he could not "take care that the laws be faithfully executed." *Id*. at 164.

The *Myers* rule has been reaffirmed repeatedly to the present day. The Supreme Court did so recently in *Free Enterprise Fund*, confirming that the President's executive power "includes, as a general matter, the authority to remove those who assist him in carrying out his duties" to faithfully execute the laws. 561 U.S. at 513-14. "Without such power, the President could not be held fully accountable" for how executive power is exercised, and "[s]uch diffusion of authority 'would greatly diminish the intended and necessary responsibility of the chief magistrate himself.'" *Id*. at 514 (quoting THE FEDERALIST No. 70, at 478 (Alexander Hamilton) (J. Cooke ed. 1961)).

B. Congress May Restrict the President's Removal Power Only As to Independent, Multi-Headed Commissions.

The Supreme Court has recognized one narrow exception to the general rule of *Myers*. In 1935, the Supreme Court held that Congress could create "independent" agencies whose heads were not removable at will and would operate free of the President's supervision and direction. *Humphrey's Ex'r*, 295 U.S. at 625, 631-32.

Humphrey's Executor concerned President Franklin Roosevelt's dispute with a commissioner of the Federal Trade Commission. President Roosevelt

attempted to fire the commissioner, but the commissioner contested his removal, claiming that he was protected against firing by the FTC's for-cause removal provision. *Id.* at 621-22. In presenting the case to the Supreme Court, the Roosevelt Administration's "chief reliance" was *Myers* and its articulation of the Article II executive power. *Id.* at 626.

The Supreme Court rejected that argument and held that Article II did not forbid Congress to create an independent agency "wholly disconnected from the executive department." *Id.* at 630. The Court deferred to the FTC's "nonpartisan" nature and its charge to "act with entire impartiality" while "exercis[ing] the trained judgment of a body of experts appointed by law and informed by experience." *Id.* at 624 (quotation marks omitted). In that situation, the Court held, Congress could validly limit the President's power to remove the commissioners. *Id.* at 628-30.

Predictably, following *Humphrey's Executor*, independent agencies came to populate all corners of the federal government. These agencies "play[] a significant role in the U.S. Government" and "possess extraordinary authority over vast swaths of American economic and social life—from securities to antitrust to telecommunications to labor to energy." *PHH Corp.*, 881 F.3d at 170 (Kavanaugh, J., dissenting). Many significantly affect the daily lives of countless Americans, including the Federal Reserve Board, the Federal Communications Commission, the Federal Deposit Insurance Corporation, the Securities and Exchange Commission, the National Labor Relations Board, the Consumer Product Safety Commission, and many others. *Id.* at 173.

Those independent agencies share certain specific features recognized in *Humphrey's Executor*. Specifically, their leadership includes multiple members appointed at staggered times. As the Supreme Court observed in *Humphrey's Executor*, the FTC had five members with staggered terms, and no more than three of them could be of the same political party. 295 U.S. at 619-20. The Court thus held that the Commission was a "body of experts" deliberately "so arranged that the membership would not be subject to complete change at any one time." *See id.* at 624. Those features have come to be regarded as the *Humphrey's Executor* exception to the general rule announced in *Myers*. *See, e.g.*, *Wiener v. United States*, 357 U.S. 349, 355-56 (1958) (upholding the removal provisions of the three-member War Claims Commission); *see also Free Enter. Fund*, 561 U.S. at 483 ("In *Humphrey's Executor* [] we held that Congress can, under certain circumstances, create independent agencies run by principal officers appointed by the President, whom the President may not remove at will but only for good cause.").

Courts have recognized two primary justifications for permitting the limited removal of the heads of these independent agencies. First, "[i]n the absence of Presidential control, the multi-member structure of independent agencies serves as a critical substitute check on the excesses of any individual independent agency head." *PHH Corp.*, 881 F.3d at 183 (Kavanaugh, J., dissenting). That is, "[t]he multi-member structure thereby helps to prevent arbitrary decisionmaking and abuse of power, and to protect individual liberty." *Id.* That basic structure makes it harder for the independent agency to impinge

on individual freedom. *See id*. It further discourages arbitrary, unsound agency actions driven by the whims of one individual. *Id*. Each commissioner, in other words, acts as a check on the others through the process of "deliberative decision making." Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769, 794 (2013).

Second, multi-member independent agencies have a historical tradition since *Humphrey's Executor*. *PHH Corp.*, 881 F.3d at 182-83 (Kavanaugh, J., dissenting). In "separation of powers cases not resolved by the constitutional text alone, historical practice matters." *Id*. The Supreme Court confirmed as much in its recent decision in *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014), in which it relied on "[l]ong settled and established practice" to reach "a proper interpretation of constitutional provisions regulating the relationship between Congress and the President." *Id*. at 2559 (quotation marks omitted).

In sum, only independent agencies with several directors serving staggered terms can possibly fall within the *Humphrey's Executor* exception to the general *Myers* rule.

C. The CFPB's Structure Violates the Constitution Because It Vests Unchecked Power in a Single Director Removable Only for Cause.

That legal background makes this case clear-cut: the CFPB's structure is impermissible under Article II. *See Myers*, 272 U.S. at 117.

Unlike the multi-member agencies approved in *Humphrey's Executor* and its progeny, the CFPB is headed by a single Director. 12 U.S.C. § 5491(b). He

serves a term of five years and may be fired only for "inefficiency, neglect of duty, or malfeasance in office." *Id.* § 5491(c). And he wields "unmistakably executive responsibilities," including "criminal investigation and prosecution." *PHH Corp.*, 881 F.3d at 80 (majority op.).[2]

The director wields that executive power as to *nineteen* different federal consumer-protection statutes. 12 U.S.C. § 5512(b)(1). He may examine and investigate individuals and entities to assess their compliance with those statutes. *Id.* §§ 5514(b), 5515(b), 5516(c). He may issue "civil investigative demand[s]." *Id.* § 5562(c). He may institute enforcement actions and conduct "adjudication proceedings." *Id.* § 5563(a). He may sue in state or federal court to enforce consumer-protection laws. *Id.* § 5564.

Those facts are sufficient to resolve this case. *Myers* provides that the President's subordinates must be removable at will. *Humphrey's Executor* creates a narrow exception for multi-director independent agencies with directors serving staggered terms. Because the CFPB has a sole director, appointed for a term of five years and removable only for cause, its structure violates Article II by preventing the President from carrying out the executive power.

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[2] To be sure, the *Humphrey's Executor* Court termed the FTC functions "quasi-legislative" and "quasi-judicial," but the Court later recognized in *Morrison* that courts today would not use those same terms. 487 U.S. at 689 n.28 ("[I]t is hard to dispute that the powers of the FTC at the time of *Humphrey's Executor* would at the present time be considered 'executive,' at least to some degree.").

II. The CFPB's Unconstitutional Structure Renders All Its Actions Unlawful.

A. The Court Should Invalidate the CFPB's Enforcement Action.

Because the CFPB's structure is unconstitutional, any action it takes is necessarily invalid. In *Free Enterprise Fund*, after concluding that the Public Company Accounting Oversight Board's structure was constitutionally impermissible, the Supreme Court declared that the challengers were entitled to relief "sufficient to ensure that the reporting requirements and auditing standards to which they are subject will be enforced only by a constitutional agency accountable to the Executive." 561 U.S. at 513 (citing *Bowsher*, 478 U.S. at 727 n. 5).

The outcome in this case should be the same. Any enforcement action brought by an administrative agency is permissible only when it is brought pursuant to a mechanism that does not violate the Constitution. Until then, All American is entitled to declaratory and injunctive relief. *See id.*

Striking down the CFPB will not leave consumers vulnerable to deceptive trade practices. Indeed, Mississippi already has vigorously protected its citizens from unlawful trade practices involving All American. *See* All American Br. 4-5. In May 2017, for example, Mississippi issued an Administrative Order against All American addressing various violations of state law.[3] Among other

[3] *See* Media Release, State of Mississippi Department of Banking and Consumer Finance (May 12, 2017), http://www.dbcf.state.ms.us/documents/pr051217.pdf.

things, the State levied monetary penalties totaling almost $1.6 million, along with several severe non-monetary sanctions.[4]

B. The Court Should Disagree with the D.C. Circuit's Recent Decision Upholding the CFPB.

Earlier this year, the en banc D.C. Circuit held in *PHH Corp.* that the CFPB's structure does not violate the Constitution. *See* 881 F.3d at 77, 84. For the reasons set out above, that holding misunderstands the Constitution. Indeed, Judges Henderson and Kavanaugh, writing in dissent, fully documented the majority's erroneous reasoning, and cogently explained why that court should have reached the opposite conclusion. *See id.* at 140-64 (Henderson, J., dissenting), 164-200 (Kavanaugh, J., dissenting).

Meanwhile, the Southern District of New York has reached the opposite conclusion. *See RD Legal Funding*, 2018 WL 3094916, at *35. That court explicitly "disagree[d] with the holding of the en banc court [in *PHH Corp.*] and instead adopt[ed] Sections I-IV of Judge Brett Kavanaugh's dissent." *Id.*

This Court should decline to follow the D.C. Circuit's erroneous decision. Like the Southern District of New York, it should hold that the CFPB's structure renders the CFPB unconstitutional.

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[4] *Id.*; *see also* Agreed Order, *All American Check Cashing, Inc. v. Corley*, No. G-2017-699 S/2 (Chancery Ct. of the 1st Judicial Dist. Hinds Cty., Miss. June 9, 2017), http://www.dbcf.state.ms.us/documents/aacc_agreed_060917.pdf.

Conclusion

This Court should hold that the CFPB's structure violates the Constitution and reverse.

Respectfully submitted.

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Certificate of Service

I certify that on July 9, 2018, the foregoing Brief of Amici Curiae was served through the Court's ECF filing system on all counsel of record.

/s/ Scott A. Keller
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Certificate of Compliance

This brief contains 3,351 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii). It thus complies with Rule 29(a)(5). This brief complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Equity) using Microsoft Word (the same program used to calculate the word count).

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